Vet. App. No. 15-4813

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

ANTONIO MORALES, JR.
Appellant,

v.

ROBERT A. McDONALD,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

LEIGH A. BRADLEY
General Counsel

MARY ANN FLYNN
Chief Counsel

CAROLYN F. WASHINGTON
Deputy Chief Counsel

NATHAN PAUL KIRSCHNER
Appellate Attorney
U.S. Department of Veterans Affairs
Office of the General Counsel (027D)
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6959
Telecommuting: (414) 256-1891
Attorneys for the Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

RECORD CITATIONS

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FOR VETERANS CLAIMS

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Appellant	)	
	)	
v.	)	Vet.App. 15-4813
	)	
ROBERT A. McDONALD,	)	
Secretary of Veterans Affairs	)	
Appellee	)	

ON APPEAL FROM

THE BOARD OF VETERANS' APPEALS

APPELLEE'S BRIEF

I. ISSUE PRESENTED

Whether the Court should affirm the October 30, 2015, Board of Veterans' Appeals (BVA or Board) decision that denied entitlement to an evaluation in excess of 50-percent for service-connected generalized anxiety disorder (GAD) from May 18, 2009, to October 2, 2012.

II. STATEMENT OF THE CASE

A. JURISDICTIONAL STATEMENT

The Court has proper jurisdiction pursuant to 38 U.S.C. § 7252(a).

B. NATURE OF THE CASE

Antonio Morales, Jr. (Appellant) appeals, through counsel, that part of the October 30, 2015, Board decision that denied entitlement to an evaluation in excess of 50-percent for his service-connected GAD from May 18, 2009, to October 2, 2012. Record Before the Agency (R.) at 6-15 (3-24). Appellant

makes no argument relating to the denial of an evaluation in excess of 70-percent subsequent to October 2, 2012, and the Court should therefore consider that issue abandoned. *See Disabled Am. Veterans (DAV) v. Gober,* 234 F.3d 682, 688 n.3 (Fed. Cir. 2000). Furthermore, insofar as the Board remanded the issues of entitlement to an extraschedular evaluation for Appellant's service-connected GAD, and entitlement to a total disability rating based on individual unemployability (TDIU) for the period prior to October 3, 2012, those issues are not before the Court. *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004).

C. STATEMENT OF RELEVANT FACTS

Appellant served on active duty from January 1968 to August 1969. R. at 423 (DD Form 214).

Appellant initially submitted a claim for compensation for, in pertinent part, "mental stress" in May 2009. R. at 926 (921-34). The VA Regional Office (RO) issued a rating decision in September 2009 that denied Appellant's claim. R. at 889-94.

In July 2010, a Vet Center Intake Assessment listed a "yes" in response to the question of whether Appellant had homicidal thoughts, and explained "[He] has struggled with revenge fantasies about people in his last job who were unfair and unkind. Early retirement was his means for avoiding extreme provocation." R. at 147. Appellant denied homicidal plans at that time. *Id.* In September 2010, a treatment note from the Vet Center showed that Appellant admitted he "kept acquaintances at arms length but in a friendly way." R. at 220.

Appellant was afforded a VA examination in November 2010. R. at 571-75. He was diagnosed with GAD, which the examiner found was at least as likely as not related to his service. R. at 574 (571-75). On mental status examination, Appellant was tense and anxious, his affect was anxious, mood congruent, though process was logical and organized with no evidence of thought disorder, he denied hallucinations and delusions, he denied suicidal and homicidal ideation, and his cognition was grossly intact. R. at 573 (571-75). Appellant reported problems with memory over the last several years. *Id*. His insight was fair and judgment was good. *Id*. The examiner found his current global assessment of functioning (GAF) score to be 60-65, with the highest being 65 in the past year. R. at 574.

The RO issued a rating decision in February 2011 that, in pertinent part, granted entitlement to service connection for Appellant's GAD, and assigned a 30-percent evaluation, effective June 1, 2009. R. at 547-57. In June 2011, a VA treatment note showed that on examination Appellant was alert and attentive, oriented times three, cooperative and reasonable, his grooming was appropriate, his presentation was notable for fidgeting in his chair and constantly playing with a VA Suicide Prevention ball, his speech had normal rate and rhythm, his language was intact, his mood was anxious and depressed and his affect was congruent with that, he had no hallucinations, his thought process was normal and coherent, his thought content was not unusual, he had no suicidal or violent ideation, his insight and judgment were good, and his memory was intact. R. at

1099 (1097-1100). The examiner noted that Appellant's main problem appeared to be generalized anxiety at that time, and there was also evidence of some obsessive and compulsive tendencies. R. at 1100 (1097-1100). "[He] also appears at this time to be focused intensely on demonstrating impairment for the purposes of acquiring compensation, and it is likely that the energy and concern devoted to compensation are increasing his general anxiety levels." *Id*.

Appellant submitted a Notice of Disagreement (NOD) in August 2011, in which he disagreed with the rating assigned for his service-connected GAD. R. at 502. In September 2011, a VA treatment record showed the examiner spoke with someone "at vet center with regards to [Appellant]. She voices concerns regarding [him], in that he has been evidencing increased anxiety, decreased sleep, exaggerated startle response, and other PTSD symptoms." R. at 1096 (1096-97). On examination Appellant was alert and oriented, he was casually dressed, his hygiene was intact, speech was within normal limits, mood was "ok," his affect was constricted, his behavior was mildly fidgety, his thought process was logical, he denied suicidal and homicidal ideations, visual and audio hallucinations; his insight was good, his judgment appeared intact, and his memory was grossly intact. R. at 1097 (1096-97).

VA issued a Statement of the Case (SOC) in December 2011. R. at 465-81. Appellant perfected his appeal to the Board in January 2012. R. at 437-48. That same month a treatment record from the Vet Center showed that Appellant attended a Vet Center holiday party for Veterans and family members, and he

related well to the event and to his peers. R. at 178. VA issued a Supplemental SOC (SSOC) later that month. R. at 432-36.

In February 2012, a Vet Center group therapy note showed that Appellant's regular provider was out sick. R. at 178. He was offered the opportunity to see another provider and declined stating he was "too anxious about meeting people, extremely cautious about trusting unfamiliar people." *Id*. He found the group's discussion relevant and participated with his peers. *Id*.

A March 2012 Vet Center group therapy note showed that Appellant was angry about the manner in which he left his job, "Left 3 months before golden handshake because he 'couldn't take it any longer' and feared he might become violent." R. at 172. "Questions whether he can get compensation – he procrastinated exploring this. Stopped volunteer job at VA Medical Center when he met a guy he had dealt with at the job and that represented a disturbing trigger for him." *Id*. Appellant filled out an Application for Increased Compensation based on Unemployability in March 2012 and submitted it in May 2012. R. at 260-61. He stated he left his job because he "became alarmed at the thoughts I had about hurting other people in the department." *Id*. at 261. In May 2012, a VA mental health treatment note showed that since he started on medication in December 2011 he "noticed the irritability is better and his feelings of depression are also better." R. at 1091. His anxiety improved. *Id*. He endorsed hypervigilance and said for the past three days he had no motivation and had been tired. *Id*. He denied suicidal and homicidal ideation. *Id*.

In July 2012, a Vet Center group therapy note showed that he ruminates about not hearing back from the City, and he "went for milk and ended up in [M]assachusetts." R. at 159. In August 2012, a VA mental health treatment note showed that he was more anxious than when previously seen; upset that he had not gotten some benefits from his job he felt he was due. R. at 1091. He planned to appeal and feared losing his temper; he feared losing control of his temper. *Id*. He endorsed hypervigilance, his appetite was ok, he had interest in things, he denied suicidal and homicidal ideation, and he continued at the Vet Center which he found beneficial. *Id*. VA issued another SSOC later that month. R. at 136-39.

Appellant was afforded a VA examination in October 2012. R. at 118-125. The examiner found that Appellant's symptoms included depressed mood; anxiety; suspiciousness; near-continuous panic or depression affecting the ability to function independently, appropriately, and effectively; chronic sleep impairment; mild memory loss, such as forgetting names, direction or recent events; impairment of short-and long-term memory, for example, retention of only highly learned material while forgetting to complete tasks; flattened affect; disturbances of motivation and mood; difficulty in establishing and maintaining effective work and social relationships; difficulty in adapting to stressful circumstances, including work or a worklike setting; inability to establish and maintain effective relationships; suicidal ideation; obsessional rituals which interfere with routine activities; and impaired impulse control, such as

unprovoked irritability with periods of violence. *Id*. at 123-24. The examiner noted Appellant did not have any symptoms not listed above. *Id*. at 124.

In November 2012, a VA examination addendum reviewed the October 2012 VA examination report. R. at 116 (113-17). The examiner stated that based on the "review of the prior opinion and the documented symptoms that were reported in the mental health record, the severity of the symptoms present in the October 2012 report do *not* comport with the symptoms reported by treating mental health clinicians over the past year to two years." *Id* (emphasis supplied). The examiner noted that in June 2011 Appellant's symptoms did "not appear to be more than moderate" and that the examiner at that time reported his anxiety "might be influenced by [his] apparent desire to seek benefits." *Id*. The examiner also noted that a December 2011 treatment note indicated moderate impairment. *Id*.

The RO issued a SSOC in December 2012, that stated VA was increasing the evaluation for Appellant's service-connected GAD from 30-percent to 70-percent effective October 3, 2012. R. at 108-12. The RO issued a rating decision that same month implementing that increase. R. at 96-105. In April 2013, Appellant submitted a letter from a Vet Center social worker in support of his claim. R. at 52-54. Appellant was awarded TDIU in a May 2013 rating decision. R. at 40-50.

III. SUMMARY OF ARGUMENT

Appellant makes a two general allegations of error on appeal. *See* Appellant's Brief (App. Br.) at 7-19. Specifically, he argues that the Board "did not properly interpret the law" when it denied an evaluation in excess of 50-percent for his service-connected GAD prior to October 3, 2012. *See* App. Br. at 7-15. Second, he argues that the Board "misinterpreted the law" when it "refused to consider" evidence post-dating October 2, 2012, for the rating period from May 18, 2009, to October 2, 2012. *See* App. Br. at 15-19. Appellant's arguments are unconvincing, and amount to nothing more than a disagreement as to how the Board weighed the evidence on appeal. Appellant has failed to carry his burden of demonstrating that the Board's decision contained prejudicial error, and the Court should therefore affirm it.

IV. ARGUMENT

A. Appellant has not carried his burden of demonstrating prejudicial error, and the Court should therefore reject her arguments.

The Court should affirm the Board's decision because "the Court of Appeals for Veterans Claims' proceedings *are not non-adversarial*," *Forshey v. Principi*, 284 F.3d 1335, 1355 (Fed. Cir. 2002) (en banc) (emphasis added), and Appellant has failed to carry his burden of demonstrating the existence of any prejudicial error. *See Shinseki v. Sanders*, 556 U.S. 396, 406-10 (2009); *Barrett v. Shinseki*, 22 Vet.App. 457, 461 (2009).

1. The Board properly applied the law, and its statement of reasons or bases for denying entitlement to a disability rating in excess of 50-perecent for Appellant's service-connected GAD was adequate.

Determining the degree of disability is a finding of fact subject to the "clearly erroneous" standard of review. *Janssen v. Principi,* 15 Vet.App. 370, 377 (2001); *Johnston v. Brown,* 10 Vet.App. 80, 84 (1997). The Board may assign separate disability ratings for distinct periods, known as "staged" ratings, where "factual findings show distinct time periods where the service-connected disability exhibits symptoms that would warrant different ratings." *Hart v. Mansfield,* 21 Vet.App. 505, 510 (2007). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conclusion that a mistake has been committed.'" *Gilbert v. Derwinski,* 1 Vet.App. 49, 52 (1990) (quoting *United States v. U .S. Gypsum Co.,* 333 U.S. 364, 395 (1948)). The Board is required to include in its decision a statement of reasons or bases for all its findings and conclusions, which "must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate informed review in this Court." *Allday v. Brown,* 7 Vet.App. 517, 527 (1995); *see* 38 U.S.C. § 7104(d)(1).

It is similarly well-settled that it is the Board's responsibility to assess the probative value of evidence, and it is part of this responsibility to interpret medical reports into a disability rating. *See Owens v. Brown,* 7 Vet.App. 429, 433 (1995) (holding that it is the Board's responsibility "to assess the credibility and weight to

be given to evidence"); *Moore v. Nicholson,* 21 Vet.App. 211, 218 (2007) (stating that "[t]he medical examiner provides a disability evaluation and the rating specialist interprets medical reports in order to match the rating with the disability"), *rev'd on other grounds sub nom. Moore v. Shinseki,* 555 F.3d 1369 (Fed.Cir.2009); 38 C.F.R. § 4.126(a) (2015) (providing that "[t]he rating agency shall assign an evaluation based on all the evidence of record that bears on occupational and social impairment rather than solely on the examiner's assessment of the level of disability at the moment of the examination").

Regarding ratings for psychiatric disabilities under 38 C.F.R. § 4.130, entitlement to a specific disability rating requires "sufficient symptoms of the kind listed in the [relevant rating] requirements, or others of similar severity, frequency[,] or duration." *Vazquez–Claudio v. Shinseki,* 713 F.3d 112, 118 (Fed.Cir.2013). For example, "[I]n the context of a 70 percent rating, § 4.130 requires not only the presence of certain symptoms but also that those symptoms have caused occupational and social impairment in most of the referenced areas." *Id.* at 117. "Although the veteran's symptomatology is the primary consideration, the regulation also requires an ultimate factual conclusion as to the veteran's level of impairment in 'most areas.'" *Id.* at 118.

Appellant first argues that the Board "focused on the laundry list of symptoms mentioned in the rating criteria and provided inadequate analysis as to [his] occupational and social impairment." App. Br. at 9. Appellant argues that had the Board given greater weight to "the frequency and severity of the

symptoms [he] *did* exhibit, it may have determined that [he] was entitled to a higher rating." App. Br. at 10. Appellant then discusses symptoms including anxiety, irritability (App. Br. at 11), speaking at a "retarded pace" and being cautious about meeting new people (App. Br. at 11-12), difficulty concentrating, learning and recalling information (App. Br. at 12), depression (*id*), that he was worried about getting upset and out of control (*Id.*), that he was easily provoked (*id*), that he got very angry (App. Br. at 12-13), and that he had "obsessional ritualistic behavior." App. Br. at 13.

These symptoms were discussed by the Board. The Board discussed multiple instances of anxiety and irritability (R. at 10-14), including that he wanted to be left alone. *Id.* at 13. It discussed memory problems. *Id.* at 11. It discussed depression (*Id*. at 12) ("his mood was anxious and depressed")) and anger. *Id*. at 13 (Appellant was "ruminating over having left his job due to feeling like he would hurt someone."), *Id. at* 14 ("significant irritability"). Finally, it repeatedly discussed Appellant's obsessive behavior. *Id*. at 10, 12, 14. The Board then concluded, "viewing all the evidence," that Appellant's GAD "approximated" the level of a 50-percent evaluation prior to October 3, 2012. *Id*. at 14 citing 38 C.F.R. § 4.130 Diagnostic Code (DC) 9400. It found that his symptomatology was not "of such severity" as to produce "occupational and social impairment with deficiencies in most areas," and that a higher, 70-percent evaluation was not warranted. *See Id*. at 14-15. The Board therefore appropriately considered the severity of Appellant's complete disability picture (*Id*. at 14-15), and Appellant's argument

amounts to nothing more than a request that the Court re-weigh the evidence, which it should not do. *See Owens*, 7 Vet.App. at 433. No error exists as alleged, and the Court should therefore reject Appellant's argument.

The Court should likewise reject Appellant's second argument, which is essentially that the Board should have used the October 2012 VA examination to assign a higher rating prior to the date of the examination, because it is appropriate for the Board to assign staged ratings. *See* App. Br. at 15-17; *Hart*, 21 Vet.App. at 510. Importantly, Appellant completely ignores the November 2012 VA examination addendum (R. at 113-17), in which the examiner states that the symptoms exhibited in the October 2012 VA examination report did *not* reflect Appellant's symptomatology prior to that date. *Compare* App. Br. at 15-17 *with* R. at 116 (113-17). Given this finding by the examiner, the selection of the date of the October 2012 VA examination as the date of the increase was completely appropriate: it was supported by the record, within the Board's purview, and not clearly erroneous. *See* R. at 17 (3-24); *Hart*, 21 Vet.App. at 510; *Moore*, 21 Vet.App. at 218; *Owens*, 7 Vet.App. at 433. The Court should therefore reject Appellant's argument.

Furthermore, insofar as Appellant appears to fault the Board for taking into account the effects of his medication, App. Br. at 18 citing *Jones v. Shinseki*, 26 Vet.App. 56, 60 (2012), this argument misses the mark. As Appellant acknowledges, *Jones* does not prohibit the consideration of the effects of medication when those effects are contemplated by the rating schedule. *See*

Jones, 26 Vet.App. at 60. The rating schedule for psychiatric disabilities contemplates the effects of medication. *See* 38 C.F.R. § 4.130 (assigning, for example, a 10 percent evaluation for "symptoms controlled by continuous medication."). Appellant's argument must therefore fail.

Appellant next alleges that the Board erred when it noted that his examiners did not use the word "severe" to describe his symptoms. *See* App. Br. at 18-19. The Court should reject this, as it is again nothing more than a disagreement with how the Board weighed the evidence and does not demonstrate clear error. *See Owens*, 7 Vet.App. at 433. Again, the Board is tasked with examining the medical evidence of record and interpreting the medical evidence to match the disability rating. *See Moore*, 21 Vet.App. at 218. Indeed, the severity of Appellant's symptoms is part of the analysis when assigning a rating under section 4.130, *see Vazquez-Claudio*, 713 F.3d at 118, and it stands to reason that the Board would be able to consider and discuss whether examiners felt Appellant's symptoms were "severe." That all the Board did here, and the Court should therefore reject Appellant's argument.

Finally, Appellant generally alleges that the Board's statement of reason or bases was inadequate. *See* App. Br. at 19. It is well settled that the Board's statement of reasons or bases is adequate when it enables the appellant to understand the precise basis for the decision rendered and facilitates judicial review. *See Allday*, 7 Vet.App. at 527. Here, the Board's analysis meets those criteria (R. at 6-21 (3-24)), and more importantly Appellant has not alleged that it

does not. *See* App. Br. at 19. The Court should therefore reject Appellant's argument and affirm the Board's decision.

V. CONCLUSION

Upon review of all of the evidence and Appellant's arguments, he has not demonstrated that the Board committed error, much less prejudicial error, in its findings of fact or conclusions of law. Because Appellant has not carried his burden of showing prejudicial error, the Court should affirm the Board's decision. The Secretary further urges the Court to find that Appellant has abandoned any other arguments, therefore rendering it unnecessary to consider any other error not specifically raised. *See DAV,* 234 F.3d at 688 n.3; *Degmetich v. Brown*, 8 Vet.App. 208, 209 (1995), *aff'd* 104 F.3d 1328 (Fed. Cir. 1997).

Respectfully submitted,

LEIGH A. BRADLEY
General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Carolyn F. Washington
CAROLYN F. WASHINGTON
Deputy Chief Counsel

/s/ Nathan Paul Kirschner
NATHAN PAUL KIRSCHNER
Appellate Attorney
Office of the General Counsel (027D)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6959
Telecommuting: (414) 256-1891

Attorneys for Appellee Secretary of Veterans Affairs